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No. 82-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEFFERSON PARISH HOSPITAL DISTRICT No. 2 and EAST JEFFERSON HOSPITAL BOARD,

Petitioners

v.

EDWIN G. HYDE, M.D.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE COLLEGE OF AMERICAN PATHOLOGISTS IN SUPPORT OF PETITIONERS

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v.

Edwin G. Hyde,
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Court Of Appeals For The Fifth Circuit

CONSENT

On behalf of petitioners Jefferson Parish Hospital District No. 2 and East Jefferson Hospital Board, the undersigned hereby consents, pursuant to Rule 36 of the Rules of the Supreme Court, to the filing of a brief amicus curiae on behalf of the College of American Pathologists in this matter.

HENRY S. ALLEN, JR.
Counsel for Petitioners

DATED: April 1, 1983

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CONSENT

On behalf of respondent Edwin G. Hyde, the undersigned hereby consents, pursuant to Rule 36 of the Rules of the Supreme Court, to the filing of a brief amicus curiae on behalf of the College of American Pathologists in this matter.

JOHN M. LANDIS
Counsel for Respondent

DATED: April 4, 1983

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BRIEF AMICUS CURIAE OF THE COLLEGE OF AMERICAN PATHOLOGISTS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

This brief is submitted in support of petitioners by the College of American Pathologists. It is being filed with the consent of all parties.[1]

The College of American Pathologists and its approximately 9,000 pathologist members have a substantial in-

[1] Copies of the parties' consents are printed in the Appendix.

terest in the question presented in this case. Pathologists are physicians who specialize in applying medical knowledge and judgment to the testing and analysis of biologic specimens in connection with the diagnosis and treatment of human disease. Services performed by pathologists include, for example, the following:

(a) Examination of human tissue as it relates to the diagnosis or treatment of disease;

(b) Solving of problems relating to the identification of compatible blood for transfusions;

(c) Analysis of hematology smears and test results;

(d) Interpretation and reporting of results of specific procedures; and

(e) Performance of quality assurance services so that every test yields a medically reliable result.

Because these services are performed for hospital inpatients, pathologists customarily enter into contracts with hospitals. Available data suggest that a substantial portion of these contracts provide for exclusive arrangements similar to that found unlawful *per se* by the court of appeals in this case.[2]

Although the arrangements between pathologists and hospitals differ in certain respects from those involving anesthesiologists, the blunt rationale of the decision below threatens to disrupt many such arrangements. Thus, if affirmed, the decision will adversely affect the contractual relationships of many of the College's members. Moreover, to the extent that exclusive contracts enhance the quality of medical care, the decision below is inimical to the interests of patients whom the College's members are committed

[2] See American Medical Association, Center for Health Policy Research, *SMS Report* (Feb. 1982); see also Feldstein & Roehrig, *An Analysis of Exclusive Contracts and Closed Staffing in Hospitals: The Effects on Competition* (a report to the FTC).

to serve. For these reasons, the College of American Pathologists offers this brief as Amicus Curiae.

STATEMENT OF THE CASE

This case involves an antitrust challenge by the respondent, Edwin G. Hyde, M.D., to a contract between East Jefferson General Hospital and a professional medical corporation, Roux & Associates, under which anesthesiology services in the Hospital would be provided exclusively by the corporation's physicians. The district court concluded that the contract did not unreasonably restrain trade and thus did not violate the Sherman Act. 513 F. Supp. 532. The court of appeals reversed. 686 F.2d 286. It concluded that petitioners had tied the sale of distinct medical services (i.e., surgical facilities and anesthesia) and that the tie was unlawful *per se* because, in its view, the Hospital had sufficient market power to coerce the purchase of anesthesiology services.

SUMMARY OF ARGUMENT

Applying precedent holding that commercial tying arrangements are unlawful *per se,* the court of appeals held that an exclusive contract between a hospital and a group of hospital-based physicians was a tie and therefore violative of the antitrust laws. It reached this conclusion without any analysis of the competitive significance of the contract. The contract in question, however, is not a tie. It involves no forced purchase of a second distinct commodity. Moreover, it serves to facilitate competition by promoting quality of service.

Even if the contract were properly characterized as a tie, however, application of the *per se* rule would nonetheless be inappropriate. This Court has repeatedly admonished that the fact that a restraint operates upon a profession as distinguished from a business is relevant in determining whether that particular restraint violates the Sherman Act. See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 778-779 n.17 (1975). In view of the unique medical context of the contract in question, the court of appeals should have considered the competitive significance of the arrangement rather than to strike down the arrangement by wooden invocation of the *per se* rule. The decision in *Arizona* v. *Maricopa County Medical Society*, ____ U.S. ____, 102 S.Ct. 2466 (1982), is not to the contrary. The *per se* rule was applied there because that case involved price fixing—not, as here, an arrangement designed to enhance the quality of patient care.

Application of the rule of reason leads to the conclusion that the contract in question is lawful because it promotes competition. Specifically, by enhancing the quality of care, it enables petitioner hospital to compete effectively with other hospitals. In addition, it promotes competition among hospital-based physicians to offer high quality services at the lowest cost in order to be selected for the exclusive position. For all these reasons, the court of appeals erred in using the antitrust laws to second-guess a reasonable judgment of a hospital and physicians regarding the most effective way in which to provide certain medical services to patients. Accordingly, its decision should be reversed.

ARGUMENT

I. EXCLUSIVE ARRANGEMENTS BETWEEN HOSPITALS AND HOSPITAL-BASED PHYSICIANS SHOULD BE JUDGED UNDER THE RULE OF REASON RATHER THAN THE PER SE RULE.

The court of appeals struck down as unlawful *per se* a contractual form that, as the district court found, is a "common practice in the health care industry." 513 F. Supp. at 540. Without substantial discussion, the court decided that the arrangement constituted a tie-in of distinct services "which a buyer should be able to obtain separately." 686 F.2d at 289. It concluded that the contract was thus illegal *per se*.

The contract in this case, however, is decidedly not a tie. The rule against tying arrangements is designed to prevent a seller from coercing the purchase of a distinct product that the buyer does not want. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953). This case does not involve a purchase of a distinct service that the patient does not want. There is no demand for operations without anesthesiology. Rather, the patient expects both services to be provided together. Anesthesiology services are "an ancillary and necessary part" of surgery. See *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 253-254 (4th Cir. 1971). They "may fairly be treated by the seller as inseparable" from the surgery. See *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653, 655 (1st Cir.), cert. denied, 368 U.S. 931 (1961). In these circumstances, hospital rooms and anesthesiology services cannot correctly be regarded as distinct products for antitrust purposes. The *per se* rule of illegality is therefore not implicated at all.

In any event, "the rules governing tying arrangements are designed to strike solely at practices employed to impede competition on the merits." *Hirsh* v. *Martindale-*

Hubbell, Inc., 674 F.2d 1343, 1347-48 (9th Cir. 1978), cert. denied, No. 82-570 (Nov. 1, 1982). Where the arrangement "serves to facilitate competition by promoting product quality" no tying arrangement exists. *Id.* That is precisely the situation here. See pp. 10-12, *infra*.

Even if the contractual arrangement in question could be considered as a kind of tie-in, however, the court of appeals erred in applying the *per se* rule. The court should have heeded this Court's admonition that antitrust concepts which originated in other areas should not automatically be applied to the professions. *Goldfarb, supra*, 421 U.S. at 788-789 n. 17; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978). Professional practices are not interchangeable with commercial activities, and "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb, supra*, 421 U.S. at 788-789 n. 17. Indeed, this case bears out the wisdom of that observation—for it involves the striking down, *without any serious economic analysis*, of a contract which reflects the best judgment of a hospital and a physician group regarding how medical care can most efficiently be delivered.

The court of appeals erroneously believed that it was required to apply the *per se* rule by this Court's decision in *Arizona* v. *Maricopa County Medical Society*, ____ U.S. ____, 102 S.Ct. 2466 (1982). The Court held in that case that maximum fee agreements among physicians, as price-fixing agreements, were unlawful *per se* under the Sherman Act. The rationale of that decision, however, is limited to price fixing. Moreover, the Court suggested that a *per se* analysis is inappropriate for agreements that are "premised on public service or ethical norms" or that are alleged to enhance "the quality of the professional service." *Id.* at 2475.

The facts of this case are fundamentally different from those that led to application of the *per se* rule in *Maricopa*. First, this case does not involve price-fixing agreements, which have long been determined to be such naked restraints of trade as to warrant automatic condemnation under the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). Rather, exclusive contracts between hospitals and physicians "create relationships among hospitals, physicians, and patients that have no clear parallels in commercial practice."[3] In the context of such unique arrangements, particularly involving medical professionals, it is imperative for courts fully to consider the competitive significance of the arrangements. *Goldfarb*, *supra*.

Second, unlike the agreement at issue in *Maricopa*, the purpose of the exclusive contract between the hospital and the anesthesiology group in this case was "to enhance

[3] FTC Letter to Robert E. Nord, dated February 24, 1983, ("FTC Opinion Letter"), p. 3. In its letter, the FTC issued an opinion advising a hospital that a contract between the hospital and a physician group granting the group the exclusive right to provide radiology services to patients in the hospital did not violate the antitrust laws. The FTC concluded that the contract was "most closely analogous to a requirements contract, a type of exclusive dealing arrangement, that should be judged under the rule of reason in a fashion similar to that for more traditional vertical restraints." *Id.* at 7. In this regard the FTC expressly rejected the court of appeals' characterization of the contract in this case as a tie-in subject to a rule of *per se* illegality. *Id.* at 6. The FTC identified the considerations that it believes are relevant in determining the reasonableness of such arrangements: the extent of the markets for hospital and physician services involved in the contract, the purpose of the contract, its duration, the extent to which the contract deters entry, the extent of competition for the contract, and the benefits the hospital and the public derive from the contract. *Id.* at 7.

patient care," 513 F. Supp. at 541—a purpose lying at the core of the medical profession. As the district court found, the effect of the contractual arrangement was to improve "the quality of the professional services" that patients received. See *Maricopa, supra,* 102 S.Ct. at 2475. In addition, the contract demonstrably enhanced competition by "improving a hospital's ability to provide competent health care competitively." 513 F.Supp. at 544.

That the court of appeals' cursory analysis led it automatically to condemn an arrangement affording such benefits to patients underscores the necessity of considering the purposes and effects of petitioners' contract. The antitrust laws are, after all, a "consumer welfare prescription." *Reiter* v. *Sonotone,* 442 U.S. 330, 343 (1979). For these reasons, all other courts that have considered exclusive arrangements between hospitals and physicians have concluded that they are subject to a rule of reason.[4] Like the district court here, these courts have concluded that such arrangements do not necessarily have anticompetitive effects and that the particular arrangement at issue in each case did not unreasonably restrain trade.[5] The rule of reason, applied in this case, dictates the same result.

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[4] See *Smith* v. *Northern Michigan Hospitals, Inc.,* 1983-1 Trade Cases (CCH) ¶ 65,289 (6th Cir., Mar. 25, 1983); *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center,* 684 F.2d 1346 (7th Cir. 1982); *Capili* v. *Shott,* 620 F.2d 438 (4th Cir. 1980); *Harron* v. *United Hospital Center, Inc.,* 522 F.2d 1133 (4th Cir. 1975), cert. denied, 424 U.S. 916 (1976); *Robinson* v. *Magovern,* 521 F. Supp. 842 (W.D. Pa. 1981), aff'd mem., 688 F.2d 824 (3d Cir. 1982), cert. denied, No. 82-415 (Nov. 1, 1982).

[5] As a means of efficiently integrating the provision of related medical services, such arrangements are properly viewed as vertical restrictions, analogous to requirements contracts. *Smith* v. *Northern Michigan Hospitals, Inc., supra,* 1983-1 Trade Cases at 69,706; *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center, supra,* 684 F.2d at 1352; FTC Opinion Letter, *supra,* p. 6; see also *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977).

II. THE EXCLUSIVE ARRANGEMENT AT ISSUE HERE PROMOTES COMPETITION AND THUS SATISFIES THE RULE OF REASON

Hospitals have the responsibility to provide patients with comprehensive medical care. In carrying out this responsibility, they must provide various products—clean, well-equipped hospital rooms, sanitary and modern surgical facilities, food, and so forth. It could not be seriously suggested that a hospital engages in an unlawful tie-in when it selects one contractor to provide meals or laundry services to patients rather than opening its rooms to a parade of outside vendors. Yet such a parade is precisely what the overbroad holding of the court of appeals would require.

More importantly, hospitals must make sure that medical services, including services performed by anesthesiologists, radiologists, and pathologists, are efficiently provided. Just as a hospital does not violate the antitrust laws when it selects a particular food vendor or laundry service to provide meals or linens, likewise it does not violate those laws when it chooses a group of hospital-based physicians to provide specialty services to patients.

A hospital can ensure the availability of the services of anesthesiologists, radiologists, and pathologists in a number of ways. It can open its staff to any qualified independently practicing individual, employ such specialists directly, or, as petitioners did, enter into an exclusive contract with a particular group of specialists. Which of these arrangements in a given situation will permit a hospital to dispense quality health care most efficiently will depend upon a variety of factors—including the scale of the hospital's operation, the range of skills and services offered by the physician group, the frequency of need for the specialists' services, and the extent to which these services must

be coordinated with other aspects of the patient's care. None of these arrangements, however, is necessarily anti-competitive.

Indeed, the medical and economic justifications for exclusive contracts between hospitals and hospital-based physicians were suggested by the findings of the district court in this case. The court found that a number of efficiencies resulted from the arrangement between petitioners and Roux: more certain 24-hour availability of services; improved control and standardization of procedures; efficient and less costly operation of the department, facilitated in part by the use of nurse anesthetists; flexibility and efficiency in scheduling operations; enhanced proficiency of physicians, nurses, and technicians with the anesthesiology equipment; better monitoring of medical standards; and less costly maintenance of equipment. 513 F. Supp. at 540.[8]

Similar improvements and efficiencies in the provision of patient care can be realized where the services of other specialists are engaged. Exclusive arrangements are com-

[8] The court of appeals rejected these efficiencies as justification for the contract, believing that they could be achieved by less restrictive alternatives. 686 F.2d at 292. As a practical matter, the court's "less restrictive" alternative standard would admit few if any competitive justifications, since it would be rare that some means of achieving a given business purpose could not be imagined that would result in a lesser restraint of trade. See *American Motor Loans, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975); cf. *Illinois Elections Board* v. *Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring). In any event, whatever the relevance of "less restrictive" alternatives once an arrangement has been determined to be a tie-in, they are not dispositive of justifications advanced, as in this case, for not regarding the arrangement as a tie-in in the first instance. See *Hirsh* v. *Martindale-Hubbell, Inc.*, *supra*, 674 F.2d at 1347.

mon in the provision of medical services by members of Amicus College of American Pathologists. Pathology services must be available continuously throughout the day. Many pathology services depend upon highly sensitive laboratory instruments of which the care and calibration must be closely supervised. Analyses frequently require the coordinated work of numerous technicians and other nonphysician personnel, as well as the coordinated services of several sections of the laboratory—e.g., hematology, microbiology, clinical chemistry. In view of the scale and complexity of the pathology departments in many hospitals, it frequently would be impossible efficiently to organize their operations without the centralized control and accountability that exclusive arrangements afford.

By contributing to the efficient operations of the hospital, an exclusive arrangement promotes competition among hospitals both for patients and for members of the staff. See *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center, supra,* 648 F.2d at 1353-1354; *Robinson* v. *Magovern, supra,* 521 F. Supp. at 919; FTC Opinion Letter, *supra,* at 4. As the district court found in this case, by "increasing the quality of medical care available," the exclusive contract enhanced competition among hospitals. 513 F. Supp. at 541.[7] Thus, the existence of an exclusive arrangement within a hospital merely shifts the focus of competition. Cf. *Continental T.V., Inc.* v. *GTE Sylvania Inc., supra,* 433 U.S. at 51-57.

In addition, an exclusive arrangement produces competition among different physician groups to be selected for the position offered by a hospital. See 513 F. Supp. at 541. Competition among physician groups for exclusive contracts can be a very effective means of producing high quality medical service at the lowest price. In fact, given the

[7] In the case of pathologists, additional competition is provided by independent laboratories whose services compete with those offered in hospitals.

practical difficulties facing patients in comparing the services of hospital-based anesthesiologists, radiologists, and pathologists, such competition is often more effective than would be unbridled competition among specialists within the departments of a single hospital. *Dos Santos, supra,* 684 F.2d at 1354.[8]

In any event, the contract at issue here certainly did not suppress competition. As the district court noted, East Jefferson Hospital competes in a market that includes at least twenty other hospitals providing the same surgical services. 513 F. Supp. at 541-542.[9] Patients and surgeons often ex-

[8] See also *Maricopa, supra,* 102 S. Ct. at 2485 n.13 (Powell, J., dissenting):

> "Medical services differ from the typical service or commercial product at issue in an antitrust case. The services of physicians, rendered on a patient-by-patient basis, rarely can be compared by the recipient. A person requiring medical service or advice has no ready way of comparing physicians or of "shopping" for quality medical service at a lesser price."

[9] The district court found that East Jefferson had no economic power within this market and thus could neither unreasonably restrain competition nor coerce the purchase of allegedly tied medical services. 513 F. Supp. at 540-543. The court's findings of fact were fully supported by the record. The court of appeals did not disagree with these findings. Indeed, it acknowledged that under a "traditional method of economic power analysis" the respondent had "failed to prove an illegal tying arrangement." 686 F.2d at 290. Instead, the court rested its conclusion that the Hospital had sufficient market power to warrant enjoining its conduct as a tie-in on "several market imperfections in the health care industry" which it believed "led patients to select the hospital closest to home" and to prefer nonprofit hospitals like East Jefferson. *Id.* Not only does the record in this case not support the court of appeals' de novo findings concerning the nature of competition in the health care industry, but the facts even as viewed by the court do not indicate that the Hospital had any market power of significance under the antitrust laws.

ercise the option of going to another area hospital. *Id.* Thus, the exclusive contract, involving only one hospital, affected only a small part of the market for anesthesiology services, ensuring that competition would exist between hospitals and between anesthesiologists at different hospitals. Moreover, the duration of the exclusive contract was only one year, short enough to ensure competition between anesthesiology groups seeking to obtain the contract at the time of its renewal.

Amicus College of American Pathologists submits that, for all the foregoing reasons, the appropriate analysis was set forth in *Smith* v. *Northern Michigan Hospitals, Inc.*, ____ F.2d ____, 1983-1 Trade Cases (CCH) ¶ 65,289 (6th Cir. Mar. 25, 1983). There, the Sixth Circuit sustained an exclusive contract between a hospital and a physician group for the provision of emergency room services. Noting that these services could be provided in a number of ways, the court concluded that the exclusive contract was "undisputedly legitimate" (*id.* at 69,708):

> "In the present case [the hospital] has only one emergency room through which to provide emergency services to the public. It was required to choose among alternative methods of providing this service in an effective, efficient, and medically prudent manner. We agree with the District Court that the defendant [hospital] chose to staff its consolidated emergency room with full-time specialists in emergency care for undisputedly legitimate financial and medical reasons. The appellants have failed to present any evidence which would contradict [the hospital's] manifestly legitimate and well-supported justification that full-time specialists trained as emergency room physicians provide medical services superior to those of generalists who rotate on a part-time basis while maintaining full private practices."

In other words, absent evidence of clear anticompetitive intent, courts should not use the antitrust laws as a vehicle

to second-guess the judgment of hospitals and physicians concerning the most efficient means of meeting the needs of patients.

CONCLUSION

For the foregoing reasons, Amicus College of American Pathologists suggests that the judgment of the court of appeals be reversed.

Respectfully submitted,

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